No. 10056.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MONARCH BREWING COMPANY, a corporation,

Appellant,

vs.

GEORGE J. MEYER MANUFACTURING COMPANY, a corporation,

Appellee.

APPELLANT'S CLOSING BRIEF.

ALFRED F. MACDONALD,
505 Taft Building, Los Angeles,

BODKIN, BRESLIN & LUDDY,
1225 Citizens National Bank Building, Los Angeles,
Attorneys for Appellant.

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PAUL P. O'BRIEN,

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Statement in Respect to Issues of Fact and Law Involved.

All of the facts pertinent to the determination of the questions presented on this appeal are fully set forth in our opening brief and in an extended statement of the case in the appellee's brief. From these statements it appears that this is an action for damages for some $214,000.00, arising from the breach of defendant's implied and express warranty, in respect to certain beer bottling machinery sold by the appellee, a resident and citizen of the state of Wisconsin to appellant, a resident and citizen of the state of California. Under the circumstances we feel there is no occasion to here repeat the facts from which this litigation arose.

An examination of the appellee's brief discloses that the only point raised in its brief, which has not been fully covered by our opening brief, is the contention that this Court has no jurisdiction over this appeal for the reason, as appellee contends, that the notice of appeal was not filed in time. Accordingly we will confine this brief to a consideration of this single point.

ARGUMENT.

I.

The Appeal Having Been Taken From the Summary Judgment Filed and Entered October 13, 1941, and the Notice of Appeal Having Been Filed January 13, 1942, the Notice of Appeal Was Filed Within the Required Three Months After the Entry of the Judgment Appealed From.

The appellee's contention that the notice of appeal was filed too late is predicated upon the erroneous assumption that the three months' period in which the appellant might appeal from the summary judgment commenced to run from the date of the order granting appellee's motion for a summary judgment, rather than from the date of the filing and notation of the entry of the judgment from which the appeal was taken.

Section 230 of Title 28, U. S. C. A., provides as follows:

> "230. Time for making application for appeal or writ of error. No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

Rule 58 of the *Rules of Civil Procedure* is in part as follows:

> "The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry."

The notice of appeal, together with its filing mark, are as follows:

> "NOTICE OF APPEAL
>
> Notice is hereby given that Monarch Brewing Company, a corporation, plaintiff in the above entitled action, hereby appeals to the Circuit Court of Appeals of the Ninth Circuit, from the final judgment on plaintiff's claim, entered in this action on October 13, 1941.
>
> Dated: January 13, 1942.
>
> Alfred F. MacDonald
> Bodkin, Breslin & Luddy
> By G. Stuart Silliman
> Attorneys for Plaintiff.
>
> (Endorsed): Filed and mailed copy to Atty. for def. Jan. 13, 1942. R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy." [Tr. of Record, fol. 100.]

It thus appears that the appeal was taken from the summary judgment, entered October 13, 1941, and not from the order granting the motion for summary judgment, which order was entered October 8, 1941.

The entries in the docket showing the date of the order granting appellee's motion for summary judgment to be October 8, 1941, and the date of the entry of the sum-

mary judgment to be October 13, 1941, is set forth in the transcript on appeal, as follows:

DOCKET—UNITED STATES DISTRICT COURT

Docket 1035-Y	Title of Case	Attorneys
		For Plaintiff
	Monarch Brewing Company, a corporation,	Alfred F. MacDonald Bodkin, Breslin & Luddy
	vs	
	Geo. J. Meyer Manufacturing Co., a corporation	For Defendant: Lawler, Felix & Hall

Date	Filings-Proceedings
	ENTRY OF OCT. 8. 1941
Oct. 8 1941	Ent. order grtg. defts. mo. for summary judgment. Notified Attys. Fld. memo. decision.
	* * * * * * * * *
	ENTRY OF OCT. 13, 1941
Oct. 13, 1941	Fld. & ent. judgment pltf. take nothing & deft. have costs. D & I Judgt. Entered at C. O. B. 7, page 94. Notified Attys.
	* * * * * * * * *

It thus appears that the notice of appeal was filed within the required three months after the filing and entry of the notation in the civil docket of the judgment from which the appeal was taken.

None of the cases cited by appellee supports their contention that the notice of appeal was filed too late, for those cases simply consider the question of what are final and therefore appealable orders, but none of them consider the question as to when the three months period within

which an appeal from a summary judgment may be taken commences to run.

Neither do any of the cases cited by the appellee consider the appealability of an order granting a motion to dismiss an action upon the ground that the complaint fails to state facts sufficient to constitute a cause of action, nor do any of them consider the appealability of an intermediary order, which simply recites the granting of the motion for a summary judgment, but which order does not by its terms attempt to adjudicate or declare the rights of the paries.

Rule 56 of the *Rules of Civil Procedure* provides as follows:

> "(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

Pursuant to this provision, appellee served a notice of motion "for summary judgment in its favor."

The pertinent portion of the order made and entered October 8, 1941 (at which time the appellee contends the three months period, in which appellant might file its notice of appeal herein, commenced to run) is as follows:

> "* * * the Court now enters the following order:
>
> The motion of the defendant *for summary judgment* in its favor as to each and every claim asserted against the defendant by plaintiff's amended com-

plaint, filed August 9, 1941, hereofore argued and submitted, is now decided as follows:

> The said motion is hereby granted upon the ground that by the terms of the contract of sale of the machinery, dated February 14, 1938, the plaintiff waived the damages it now seeks to recover." [Fol. 92.]

It is clear that the order of October 8, 1941, was not intended by the Court to constitute the final judgment in the action, for it simply declared that the motion "for summary judgment" is hereby granted. In making such order the court clearly contemplated that a formal judgment should be entered pursuant to such order, which was done on October 13, 1941.

In *Continental Nat. Bank v. National City Bank,* 69 Fed. (2d) 312, plaintiff, brought an action for damages arising from defendant's failure to honor plaintiff's drafts. On August 10, 1932, an entry was made in the minutes of the trial judge and also on the record, which, after making certain recitations, declared as follows:

> " 'And it is further ordered that judgment be for plaintiff in the first and second causes of action alleged in the first amended complaint for the sum of Twenty Four Thousand Dollars ($24,000.00) with interest at the rate of seven per cent (7%) per annum from May 5th, 1924, with costs of suit.' "

On September 5, 1932, the court signed its findings of fact and conclusions of law, and judgment, which were filed the following day. On August 31, 1932, the defendant moved for a declaration of law to the effect that plaintiff was not entitled to recover upon the admitted facts, because of its failure to comply with a letter of credit. The court, in holding such application for a

declaration of law was made before the rendition of the judgment, because the order of August 10, 1932, above quoted, did not constitute a judgment but an order for a judgment, said at page 317:

> "In the instant case, while made after the entry of the trial judge's opinion with the order that 'judgment be for plaintiff,' they were made before the rendition on September 5th and the entry on September 6th of the judgment itself. The order of August 10th, we are satisfied, was neither intended nor regarded as the rendition of a judgment. It was the announcement by the trial judge that he had concluded to direct a judgment in favor of the plaintiff; the ordering part was 'for a judgment' which he would thereafter direct as distinguished from a present judgment."

So in the present case the order of October 8, 1941, was but an order for a judgment for which the appellee had moved the court and not the judgment itself.

Furthermore, inasmuch as the motion for summary judgment was predicated on the alleged insufficiency of the complaint to state a cause of action, the appellee correctly states at page 6 of its brief:

> "For the purposes of this appeal it is unnecessary to give detailed considerations to the contents of the answer."

Such being the case, the same rule must be applied in determining the appealability of an order granting the motion for summary judgment, and the time in which an appeal may be taken from the judgment entered pursuant to the granting of such motion, as are applicable to appeals from motions of dismissal on the grounds that the complaint fails to state a claim on which relief can be

granted, for in this case, under the circumstances, the motion for summary judgment served the purpose of a motion to dismiss, that is a general demurrer to the complaint, on the grounds that it did not state facts sufficient to constitute a cause of action.

Section B of *Rule 12* of the *Rules of Civil Procedure,* provide as follows:

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (6) failure to state a claim upon which relief can be granted."

This is a counter-part of the former Equity Rule No. 29, which abolished demurrers and provided for testing of the sufficiency of complaints by means of motions to dismiss.

In speaking of the effect of the above quoted provision of Rule 12, James A. Pike, in "The New Federal Rules of Civil Procedure," 12 Cal. State Bar Jour. 223, as quoted at page 31 of Balter's Rules of Civil Procedure, said:

> " 'Much dead wood has been eliminated from the procedural structure by the rule on defenses. The demurrer has been abolished. All defenses, in law or fact, or as to jurisdiction, process or venue, are properly made in the answer or other responsive pleading. But certain objections may be made by motion. Notable among these is the defense that the plaintiff has failed 'to state a claim upon which relief can be granted.' This is, of course, the subject-matter of the general demurrer in California."

In *City of San Francisco v. McLaughlin* (C. C. A. 9), 9 Fed. (2d) 390, an appeal was taken from an order granting the motion to dismiss a bill in equity. The court in dismissing the appeal from such order because it was not a final order from which an appeal would lie, said at page 390:

> "The mere granting of a motion to dismiss under this rule (Former Equity Rule 29), unless followed by a final decree, amounts to nothing more than a detetrmination on the part of the court that the bill is open to one or more of the objections urged against it, and the order on the motion is not final, any more than is an order sustaining a demurrer to a complaint in an action at law. In either case the suit or action is still pending, and must be determined by final decree or judgment before this court can acquire jurisdiction by appeal or writ of error." (Citing authorities.)

This rule was expressly approved in *Dyar v. McCandless,* 33 Fed. (2d) 578. In that case the plaintiff demurred to the answer which, by agreement of the parties, was considered as a motion to strike. Defendant appealed from the order which struck defendant's answer from the files, and granted him 20 days in which to answer or otherwise plead. The court, in dismissing the appeal because the order was not appealable inasmuch as it was in effect a ruling on the demurrer to the answer on the grounds it did not state a defense, said at page 578:

> "It is well settled that an order sustaining a demurrer to a complaint, or granting a motion to dismiss a complaint, without entry of judgment, is not a final order within the meaning of Section 128, Judicial Code (28 USCA 25)." (Citing authorities.)

The order of October 8, 1941, being in effect a ruling on a demurrer, or at most an order for a judgment, does not constitute a final judgment from which an appeal could be taken, and therefore the notice of appeal, filed January 13, 1942, from the summary judgment, entered October 13, 1941, was filed in time and this court has jurisdiction of this appeal.

Conclusion.

An examination of appellee's brief discloses that no consideration is given to the rule that an implied warranty is deemed to be incorporated in the written contract. Such being the law, the appellee's contention that appellant is precluded from recovering under the terms of the written contract cannot be sustained. Moreover, a proper construction of the writing restricted the exemption from liability to consequential damages caused by the concurrence of the negligence of the defendant with that of some other person or other event. The damages sought to be recovered not having been caused by the concurrence of any other event with the negligence of the defendant, but solely by reason of the acts of the defendant alone, the written contract does not precluded plaintiff's recovery on the express warranty.

The notice of appeal having been filed in time this court has jurisdiction of the appeal and the summary judgment for defendant should be reversed and the cause remanded for trial.

Respectfully submitted,

Alfred F. MacDonald,

Bodkin, Breslin & Luddy,

Attorneys for Appellant.